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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of the United States Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS*

Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and various areas of affirmative action. LDF believes that its experience in and knowledge gained from such litigation will assist the Court in this case.

Summary of Argument

For hundreds of years, blacks were systematically and violently deprived of the rights and privileges of full citizenship reserved for white men since this country's founding. The adoption of the Fourteenth Amendment in 1868 offered new hope that blacks would enjoy rights long afforded to whites. This promise however, was short-lived.

Following only a decade of Reconstruction, the federal government abandoned the guarantees of the Fourteenth Amendment and its role of protecting newly freed blacks. Instead, it left in place a racially tiered society that continued to privilege whites, and white men in particular, and to deprive generations of blacks of social, political, and economic capital. The most pernicious aspects of this racial caste system were

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*Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

prevalent not just in the South but throughout the country. The exclusion of blacks from the economic mainstream cemented the effects of slavery and the "separate but equal" doctrine sanctioned by this Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896). As such, by the time this Court finally ended the scourge of legally sanctioned apartheid in *Brown v. Board of Education*, 347 U.S. 483 (1954), official governmental policy had already established a system that subjugated black citizens much as slavery had done to their ancestors a century before.

The continuing effects of this pervasive racial subordination are evident in the severely depressed socioeconomic standing of the vast majority of blacks. The structural inequalities that social scientists have found limit the educational, employment, and asset-building opportunities of African Americans today are directly and powerfully rooted in this country's long-maintained, governmentally sanctioned discriminatory policies and customs. They are not vestigial, attenuated remnants of amorphous "societal discrimination."

The barriers faced by African Americans, as a class, who seek to establish construction businesses and obtain contracts, are thus very different in nature, origin and intensity from those that may be encountered by individuals of different backgrounds, contrary to Petitioner's suggestion. The Fourteenth Amendment authorizes race-conscious remedies that redress the cumulative effects of centuries of government-sanctioned discrimination against blacks and the exclusion of blacks from the economic mainstream. The Department of Transportation's Disadvantaged Business Enterprise program, therefore, serves the compelling governmental interest of remedying this country's incontrovertible history of racial oppression and of fulfilling the unfinished promise of the Fourteenth Amendment.

ARGUMENT

I. This Country Maintained A *De Jure* Racial Caste System That Brutally Enslaved African Americans For Over Two Hundred Years And For Nearly A Century Thereafter Deprived Them Of Fundamental Human And Civil Rights.

Race has been a critical dividing line in American society since the earliest days of colonial settlement. Nearly four centuries ago, blacks were kidnaped and forcibly brought to this country to be sold into slavery. For two and a half centuries, African Americans were held in slavery and deprived of the most basic human rights.[1] There can be no meaningful evaluation of the need for race-conscious remedial measures without first understanding the fundamental role that slavery, racial segregation, and pervasive racial discrimination by public and private actors have played in denying generations of blacks social, political, and economic opportunity while simultaneously conferring significant advantages on whites. "[B]ecause there was slavery . . . because the vision of others was shaped by slavery, and because most African Americans still experience unpleasant reminders that we are the descendants of those who were enslaved," we must understand and acknowledge the legacy of slavery until it ceases to

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[1] Although well documented, the deplorable status of slaves in American history bears repeating. Slaves were denied any form of education and, in many states, were legally forbidden to learn how to read. They had no right to vote, to participate in any political activities, to marry, or to contract out their services. As property, they could be bought, sold, leased, and seized on the whim of their owner. Masters had almost total discretion in exacting punishment, and many slaves endured brutal beatings. *See generally*, JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (4th ed. 1974); RICHARD KLUGER, SIMPLE JUSTICE 27 (1975).

"constrict the freedom and opportunities of African Americans."[2]

A. The Founding Fathers, Congress, And This Court Sanctioned Slavery.

The Founding Fathers established a government that sanctioned the wholesale denial of elemental human rights to blacks. As Frederick Douglass stated, the United States Constitution "was made in view of the existence of slavery, and in a manner well calculated to aid and strengthen that heaven-daring crime."[3]

During the Constitutional Convention of 1787, the Founding Fathers legitimized and secured the institution of slavery by including several clauses that sanctioned the practice. The Constitution treated a slave as three-fifths of a person for purposes of apportioning Congressional representatives and taxes among the States.[4] The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves would not end before 1808, and a provision prohibiting the amendment of that clause.[5]

The Founding Fathers included a number of clauses that

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[2] Mary Frances Berry, *Slavery, the Constitution, and the Founding Fathers: The African American Vision, in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 11, 19 (John Hope Franklin & Genna Rae McNeil, eds., 1995); *see also* Henry Louis Gates, Jr., *Editorial, The Future of Slavery's Past*, N.Y. TIMES, July 29, 2001, § 4, at 15 ("Western regrets about slavery have a different character because here the responsibility for slavery is carried forward from past to present in the form of wealth. Slavery is embedded in American prosperity.").

[3] Berry, *supra* n.2, at 14 (quoting Frederick Douglass, *The Constitution and Slavery*, N. STAR, Mar. 16, 1849).

[4] U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV; U.S. CONST. art. I, § 8, *amended by* U.S. CONST. amend. XVI.

[5] U.S. CONST. art. I, § 9; art. V.

were instrumental in maintaining the institution of slavery. The Fugitive Slave Clause, for example, provided for the capture and return of slaves to their masters.[6] Other provisions called on the federal government to protect the states from domestic violence, such as slave rebellions, and required Congress to call forth the militia to suppress such insurrections.[7] Further, the Constitution prohibited taxes on the exports produced by slaves.[8] In addition, the electoral college provision on its face gave whites in slave states a disproportionate influence in presidential elections, because it counted nonvoting slaves in apportioning representatives to the electoral college.[9] Moreover, none of these provisions could be amended without the agreement of three-quarters of the states.[10] Such provisions clearly show that the Founding Fathers firmly intended to leave intact a system in which blacks were the chattel of whites.

Congress passed laws that further strengthened the institution of slavery.[11] In 1793 and 1850, Congress enacted fugitive slave laws that empowered the federal government to apprehend fugitives and offered no protection against enslavement to northern blacks who had been born free.[12] Nearly "every free

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[6] U.S. CONST. art. IV, § 2, *affected by* U.S. CONST. amend. XIII.

[7] U.S. CONST. art. IV, § 4; U.S. CONST. art. I, § 8.

[8] U.S. CONST. art. I, § 9.

[9] U.S. CONST. art. III, § 1.

[10] Berry, *supra* n.2, at 11-12.

[11] Subsequent Congressional legislation enabled the westward expansion of slavery. The Kansas-Nebraska Act, enacted in 1854, permitted slavery to extend north of the region previously protected from slavery by the Missouri Compromise of 1820. DICTIONARY OF AFRO-AMERICAN SLAVERY 381 (Randall M. Miller & John D. Smith eds., 1988).

[12] An alleged owner need only bring the purported fugitive before any federal or state court and, upon proof of identity, the "fugitive" would be

person of color was in imminent danger of being taken up and placed in slavery with no opportunity whatever to establish a valid claim to freedom."[13]

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turned over to his captor. Proof of identity could be fulfilled by oral testimony. There was no provision for a trial or for the alleged fugitive to testify on his or her own behalf. DICTIONARY OF AFRO-AMERICAN SLAVERY 275. The Fugitive Slave Act of 1793 also exacted a $500 penalty for concealing or obstructing the arrest of an escaped slave. *Id.* The Fugitive Slave Act of 1850 created a "commissioner" who was authorized to issue warrants entitling the captor to remove fugitives to the South. As an incentive to capture blacks and force them into bondage, commissioners were paid $10 each time they authorized the removal of a fugitive and only $5 when they found that the person seized was not a fugitive slave. *Id.*

[13] John Hope Franklin, *Race and the Constitution in the Nineteenth Century, in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 21, 25 (John Hope Franklin & Genna Rae McNeil eds., 1995). Although blacks suffered from virulent racism in the South, it would be a mistake to conclude that other parts of the country were immune from racial oppression. Discrimination was rampant in all facets of Northern society, including housing, public transportation, and public venues, such as stores, restaurants, and hotels. The prospects of northern blacks were grim:

> Most free blacks . . . lived along the docks and wharves and in alleys. . . . [W]hites herded blacks into groups and pointed to the city limits. [Newly arrived] immigrants . . . cracked their skulls and burned their homes and churches. Some whites said openly that the only solution to the "Negro problem" was the "Indian solution." . . . "It would be better to kill them off at once, for there is no other way to get rid of them." . . . "We know how the Puritans did with the Indians, who were infinitely more magnanimous and less impudent than the colored race."

LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 180, 181 (5th ed. 1982). Thus, "[s]tanding outside the pale of justice, enslaved in the South, despised in the North, nineteenth-century blacks tasted the dregs of bitterness." *Id.*

Racial caste was also explicitly enforced in the area of education. In *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), the Massachusetts Supreme Court upheld school segregation for white and black children as a valid exercise of legislative power. Indeed, segregation was practiced in the public school systems of Delaware, Illinois, Indiana, and Ohio.

In addition to the scourge inflicted on free blacks by the Fugitive Slave Acts, federal and state governments enacted laws to prevent free blacks from enjoying any of the rights and privileges of citizens. The Naturalization Act of 1790, for example, barred free blacks from becoming naturalized citizens.[14] Four states — Indiana, Illinois, Iowa, and Oregon — closed their borders to blacks altogether.[15] In the Washington and Indiana territories, Congress denied free blacks the right to vote. Franklin, *supra* n.13, at 24. The individual states followed suit: every state that entered the Union after 1800, with the exception of Maine, restricted the right to vote to white males. *Id.* at 26-27. Likewise, the Second Congress passed a law establishing a uniform militia throughout the United States, but limited enrollment to white male citizens. *Id.* at 23.

This Court facilitated the institutionalization of slavery through a succession of cases in the early nineteenth century that confirmed the status of blacks as mere property, *see, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), and solidified Congress's authority "to secure to the citizens of the slaveholding States the complete right . . . of ownership in their slaves." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842). The power over fugitive slaves, this Court concluded, "was so vital to the preservation of . . . domestic . . . institutions, that it . . . constituted a fundamental article without . . . which

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SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES 71, 141, 157-65, 504-06, 510-11 (Bernard D. Reams, Jr. & Paul E. Wilson eds., 1975). Iowa, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania did not require racial segregation in the schools as a matter of law but allowed localities to educate blacks and whites separately. *Id.* at 174-75, 276, 296, 399, 410-14, 418, 538-39.

[14] Franklin, *supra* n.13, at 23.

[15] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 26 (1988).

the Union could not have been formed." *Id.* Other cases held that a person could be liable for damages to a slave owner if caught harboring fugitive slaves, even if the person had no actual notice that the harbored persons were slaves. *See Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).

Perhaps the most notorious and insidious of these cases was *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* solidified the wretched standing of African descendants and obliterated any meaningful distinction between the "rights" of free blacks and slaves. The Court concluded that blacks were not intended to be included as citizens but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ." *Id.* at 407. In its ruling, seven members of the Court recognized and upheld the racial caste system in the United States, where no person of African descent, free or slave, would be afforded the most basic rights. Until the ratification of the Fourteenth Amendment in 1868, blacks could claim no rights of citizenship long afforded whites as a matter of course.[16]

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[16] Whites created ever more ingenious means of oppressing blacks. Anti-miscegenation laws prohibited the inter-marriage of blacks and whites to protect, according to Benjamin Franklin, the purity of "the lovely White." RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 109 (1993). An ideology of blacks as inferior, "naturally lazy," and "childlike" was developed to justify racial segregation. In Philadelphia, Dr. Samuel Morton announced that the skulls of whites had a larger cranial capacity and, therefore, that whites were more intellectually capable. *Id.* at 108; *see also* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 50-72 (1981). In the North, blacks were commonly regarded as criminals, causing some states to restrict their migration. Ohio and Indiana, for example, "required entering blacks to post a $500 bond as a guarantee against becoming a public charge and as a pledge of good behavior." TAKAKI, *supra*, at 109. This view of black criminality is strikingly similar to the

B. The History Of The Fourteenth Amendment Demonstrates That The Drafters Intended It To Permit Race-Specific Measures.

The Congress that authored the Fourteenth Amendment recognized that race-conscious governmental policies were not only permissible but clearly necessary to redress the economic and social devastation that for centuries had been visited upon African Americans. Preceding the ratification of the Amendment in 1868, Congress enacted a series of race-specific social welfare laws for blacks,[17] and legislation which, though facially race neutral, was clearly intended to benefit blacks.[18] These measures were required to ameliorate the effects of the "Black Codes" that were adopted by southern states to tyrannize and oppress African Americans.[19] CONG. GLOBE, 39th Cong., 1st

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views that have spawned widespread "racial profiling" in today's society, including assumptions that blacks are engaged in criminal behavior. *See, e.g.,* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U .L. REV. 956 (1999).

[17] *See* Jed Rubenfeld, *Essay: Affirmative Action*, 107 YALE L.J. 427, 429-31 (1997).

[18] *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

[19] These "Black Codes" were startling in the breadth of restrictions imposed on the newly freed blacks. Among such state legislation were bills in South Carolina "making . . . freedmen servants [and] providing that the persons for whom they labor shall be their masters, [and] that the relation between them shall be the relation of master and servant"; and in Georgia, requiring that servants work from "sunrise to sunset," and providing that wages would be "forfeited by leaving," that the employer could "discharge servants for disobedience, drunkenness, immorality, or want of respect,"and that a $500 fine or four-month prison sentence could be imposed on a servant who left or on any person who "entic[ed] servants away." CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS DEBATES 95 (Alfred Avins ed., 2d ed. 1974). Mississippi and Louisiana had proposed similar legislation intended to strip blacks of all economic rights and social and political standing. *Id.* These extraordinarily

Sess. 39 (1865), *reprinted in* THE RECONSTRUCTION AMENDMENTS DEBATES 95 (Alfred Avins ed., 2d ed. 1974).

There is significant evidence that a major reason for the adoption of the Fourteenth Amendment was to ensure constitutional support for the race-conscious legislation passed by Congress.[20] Such legislation embraced a variety of race-specific programs targeted for blacks. Congress enacted laws appropriating funds for "the relief of destitute colored women and children,"[21] for "colored" persons in the District of Columbia,[22] and for black Union soldiers.[23] The Freedmen's Bureau Acts adopted by the Reconstruction Congress also authorized relief for blacks, including "provisions, clothing, and fuel" and the sale of up to forty acres for refugees and freedmen.

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harsh and punitive working conditions were "enforced by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever." FONER, *supra* n.15, at 203.

[20] *See generally* Schnapper, *supra* n.18, at 784-88; *see also* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 20, 94-95 (1908); ALFRED H. KELLY ET AL., 2 THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 332-33 (7th ed. 1991); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L.REV. 1060, 1114 (1991).

> The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt . . . [T]he new amendment was written and passed, at the very least, to make certain that that statutory plan was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution.

JACOBUS TENBROEK, EQUAL UNDER LAW 201, 203 (1965).

[21] Rubenfeld, *supra* n.17, at 430 (citing Act of July 28, 1866, ch. 296, 14 Stat. 310, 317).

[22] *Id.* at 431 (*citing* Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20).

[23] *Id.*

Schnapper, *supra* n.18, at 760. Later legislation reauthorizing the Freedmen's Bureau provided more explicit protection and aid for free blacks, *id.* at 772-73, while limiting the Bureau's authority to aid white refugees, *id.* at 772.

This legislative history illustrates that the drafters — who considered and squarely rejected opposition to Freedmen's Bureau legislation on the grounds that such statutes excluded whites — could not have intended to bar race-specific measures under the Fourteenth Amendment.[24] This is confirmed by early decisions of this Court, which recognized that the "one pervading purpose" of the Reconstruction Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[25] *The Slaughter House Cases*, 83 U.S. 36, 71 (1873); *see also Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 398 (1978) (Marshall, J. dissenting); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

C. The Federal Government Maintained *De Jure* Racial Segregation And Discrimination After Reconstruction And Through the Mid-Twentieth Century.

The hope that Reconstruction would finally unshackle African Americans and place them on an equal social, political, and economic footing soon faded. After barely a decade of Reconstruction, the federal government withdrew from its role

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[24] *See generally* Schnapper, *supra* n.18.

[25] Although the Court did not suggest that only African Americans were protected by the Fourteenth Amendment, it nonetheless recognized that the "pervading spirit" and purpose of that Amendment was to remedy the evil of slavery. *The Slaughter House Cases*, 83 U.S. 36, 71-72 (1873).

of protecting the newly-freed blacks.[26] The Hayes-Tilden Compromise of 1877 resulted in the withdrawal of Union troops from the South and removed "the last military obstacle to the reestablishment of white supremacy there."[27] Southern whites — determined to reassert their dominance over blacks — launched massive campaigns of intimidation and terror throughout the South.[28]

Early efforts to secure white hegemony focused on depriving

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[26] Frederick Douglass eloquently stated the position of African Americans at the close of the nineteenth century: "So far as the colored people of the country are concerned, the Constitution is but a stupendous sham . . . keeping the promise to the eye and breaking it to the heart. . . . They have promised us law and abandoned us to anarchy." Berry, *supra* n.2, at 15 (quoting Frederick Douglass, *Speech on the Occasion of the Twenty-Fourth Anniversary of Emancipation in the District of Columbia, Washington D.C., 1886, in* THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 431 (Philip S. Foner ed., 1955)).

[27] HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 200 (1980).

[28] MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW 72-79, 81 (2d ed. 1996). From Emancipation through the mid-twentieth century, the lynching of blacks was a common practice. More than 10,000 lynchings occurred between 1878 and 1898 alone. Bennett, *supra* n.13, at 258. It was not unusual for a paper to advertise a lynching and for crowds to come on chartered trains. *Id.* at 271; *see also generally* RALPH GINZBURG, 100 YEARS OF LYNCHINGS (1988); WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) (graphic description and illustration of disturbing and barbaric nature of lynchings.). The overwhelming majority of blacks lynched were charged with "crimes" such as "testifying against whites in court, seeking another job, using offensive language, failing to say 'mister' to whites, disputing the price of blackberries, attempting to vote and accepting the job of postmaster." Bennett, *supra* n.13, at 271. Far from condemning the lynching of blacks, many presidents, including Franklin Delano Roosevelt, "passively accepted lynching as a normal part of life." Matthew Holden, Jr., *Race and Constitutional Change in the Twentieth Century*, AFRICAN AMERICANS AND THE LIVING CONSTITUTION, 117, 131 (1995).

blacks of their right to vote. With the acquiescence of the national government, blacks were defrauded and intimidated at the polls. Berry, *supra* n.2, at 81-83. State legislatures adopted voting requirements, such as poll taxes and literacy tests, which had the purpose and effect of further disenfranchising blacks.[29] The advent of the all-white Democratic primary in southern states dominated by the Democratic party guaranteed white supremacy by completely denying blacks political participation.[30] As black disenfranchisement spread throughout the South, blacks' modest political gains were quickly eroded.[31] Blacks were completely deprived of any voice in federal, state, or local government. The effects of the denial of black suffrage were far-reaching. Blacks lacked the power to vote out governments that imposed rigid segregation and that denied them government resources.

Decisions by this Court foreshadowed the government's massive retreat from the guarantees of the Fourteenth Amendment and further betrayed black aspirations of equality. *See, e.g., James v. Bowman*, 190 U.S. 127 (1903); *United States*

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[29] A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 173 (1996); *see also* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 41-45, 67-70, 104-06, 136-38, 157-58, 192-96, 233-35, 271-73 (Chandler Davidson & Bernard Grofman eds., 1994). As one Mississippi judge candidly commented, "there has not been a full vote and a fair count in Mississippi since 1875 . . . we have been preserving the ascendancy of the white people by . . . stuffing ballot boxes, permitting perjury and . . . carrying the elections by fraud and violence." *Id.* at 174.

[30] Higginbotham, *supra* n.29, at 166-67.

[31] Black officials, elected for the first time during Reconstruction, lost their seats. Such black political representation would not be seen again for nearly a hundred years in states such as Georgia, North Carolina, and Louisiana. Other states, such as Texas and Florida, would not witness the election of *any* black representative for the next century. Higginbotham, *supra* n.29, at 128-29 (text accompanying photographs).

v. Harris, 106 U.S. 629 (1883); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Blyew v. United States*, 80 U.S. 581 (1872). Most notorious among these decisions were *The Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *The Civil Rights Cases*, the Court declared unconstitutional the Civil Rights Act of 1875 which had outlawed racial segregation in public accommodations. The opinion, authored by Justice Bradley, concluded that the "private wrong" of racial discrimination in public accommodations was beyond the reach of the Fourteenth Amendment. The illogic of Bradley's opinion could not be more apparent: after two centuries of the systemic oppression and subjugation of blacks in which state and federal resources were used to perpetuate the institution of slavery, this Court determined that a remedy for such deeply rooted injustice was beyond its power. Bradley's opinion fully illustrates the extent to which this Court blinded itself to the exceedingly sorry plight of the newly-freed blacks:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

109 U.S. at 25. In *Plessy v. Ferguson* this Court placed its *imprimatur* on the "separate but equal" doctrine and enshrined a government-sanctioned racial caste structure for another two generations. 163 U.S. 537 (1896). Disregarding the history and purpose of the Fourteenth Amendment and this country's entrenched racial hierarchy, this Court concluded:

> [A] statute which implies merely a legal distinction between the white and colored races — a distinction which is founded

> in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races.

163 U.S. at 543. *Plessy* marked the formal demise of the government's short-lived efforts to right deeply rooted wrongs against blacks. It would not be until *Brown v. Board of Education*, decided nearly sixty years and two generations later, that this Court would take a decisive step to rectify this country's long legacy of racial persecution.

D. Federal Policies In The Twentieth Century Perpetuated The Status Of African Americans As Third-Class Citizens.

Twentieth-century governmental policies — both before and after *Brown* — have perpetuated the legacy of slavery and state-sanctioned segregation and discrimination by erecting barriers that depressed black economic advancement and that substantially eliminated opportunities for generations of blacks to amass personal and familial assets. Even with the hard fought victory of *Brown* and the end of *de jure* segregation in public schools, blacks continued to suffer the frontal effects of federal policies designed to ensure their status as third-class citizens.[32]

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[32] In the racial pecking order, this country has reserved a peculiar form of hostility for blacks even beyond that directed against most disenfranchised racial and ethnic minorities. Although "white ethnics often experienced severe hardship due to unjust treatment, they also benefitted from the far more pervasive and brutal discrimination" against blacks. Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, 12 J. OF INTERGROUP REL. 6 (Winter, 1984). Unlike immigrants, "[t]he vast majority of [blacks] . . . arrived not on immigrant ships, but on slave ships." Aleinikoff, *supra* n.20, at 1124. "[W]hen the ingenious American devices for excluding blacks from society are contrasted with the assimilationist welcome accorded immigrants, one can quickly . . . formulate a sensible answer to the question

For the first third of the century, the majority of blacks lived in a plantation economy that was "essentially feudalistic."[33] As sharecroppers and tenant farmers, blacks were trapped in an economy that required them to pay more than they earned, and therefore they lived in "perpetual indebtedness [that kept] the tenant farmer nearly . . . as securely tied to the land and to his landlord as he was under slavery."[34] Even here, blacks were paid less than whites and, consequently, were less able to escape the system.[35]

Although conceived to promote the general social welfare, New Deal economic programs imposed serious barriers to black economic advancement. Provisions of the Social Security Act, insisted upon by southern Congressmen,[36] for more than two decades excluded domestic servants and agricultural workers from old-age pension coverage and unemployment benefits — the core programs of the Social Security Act. The racial effects of this exclusion were dramatic. More than 60% of the excluded workers were African-American, and "in the cotton states of the Deep South (Mississippi, Alabama, Georgia and South Carolina) more than three in four excluded workers were

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that lies deep in many white minds: why can't blacks do what my immigrant ancestors did?" *Id.*

[33] Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1347 (1987). *See also*, William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31 (1976) (describing series of state laws in effect as late as 1930s and 1940s that limited economic freedom of blacks in the South).

[34] Linder, *supra* n.33, at 1349.

[35] *Id.* at 1347.

[36] JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 134 (1988). *See also* ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE 24-25, 39, 59-60 (1998); JILL QUADAGNO, THE COLOR OF WELFARE 21 (1994).

black."[37] For similar reasons, another New Deal measure that brought a measure of economic security to many Americans omitted large numbers of blacks. When Congress adopted the Fair Labor Standards Act in 1938, it incorporated the same agricultural and domestic worker exemptions as featured in the Social Security Act.[38]

With the support and encouragement of state and local actors,[39] the federal government adopted policies that severely limited black home ownership opportunities, thereby depriving blacks of one of the most effective routes to personal and family wealth accumulation.[40] For decades beginning in the 1930s the Federal Housing Administration ("FHA") actively fostered residential segregation.[41] Even after restrictive covenants were outlawed by this Court in 1948,[42] the FHA overlooked devices adopted by neighborhood organizations and private citizens that accomplished the same discriminatory ends as the restrictive

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[37] Lieberman, *supra* n.36, at 44.

[38] Linder, *supra* n.33, at 1351-53.

[39] See generally Yale Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions, in* DIVIDED NEIGHBORHOODS 208-26 (Gary A. Tobin ed., 1987).

[40] MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 16 (1995).

[41] The racially discriminatory practices and mortgage insurance policies of federal agencies, including the FHA, the Veterans Administration, and the Federal Home Loan Bank Board are well documented. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-218 (1985); Glenda G. Sloane, *Creative Financing and Discrimination: Discrimination in Home Mortgage Financing, in* A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 85-87 (United States Civil Rights Commission ed., 1983); Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 POL. SCI. Q. 784-90 (1974-75).

[42] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

covenants.[43] These discriminatory practices, and similar practices by the Veterans Administration, excluded African Americans from major federal housing support programs. FHA deputy commissioner Philip Maloney reported in 1967 that in "a number of large urban centers . . . virtually no minority family housing has been provided through FHA."[44]

The FHA also institutionalized overtly discriminatory lending practices that denied black families the opportunities to buy homes and accumulate equity.[45] It defined "incompatible racial elements" as grounds for rejecting a mortgage and encouraged appraisers to rely upon physical barriers or racial covenants to guarantee against the encroachment of "inharmonious racial groups."[46] Redlining practices by the FHA and the Federal Home Loan Bank Board continued through the 1970s. Private banks and savings-and-loan associations patterned their lending policies on the discriminatory practices of the FHA, extending the reach of federal policy deep into the private sector. Moreover, these private practices continued into the 1990s. Comparably qualified black families are still rejected for home loans 60%

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[43] Orfield, *supra* n.41, at 788.

[44] *Id.* at 789 (citing CONG. REC.S15456 (1967)).

[45] *See* JACKSON, *supra* n.41, at 213-14.

[46] Orfield, *supra* n.41, at 786. For example, the FHA in Detroit in 1940 required a developer to construct a six-foot-high, foot-thick wall extending nearly a half-mile to assure the "stability" of a white neighborhood being built adjacent to a black neighborhood. Thomas J. Sugrue. *The Structures of Urban Poverty, in* THE UNDERCLASS DEBATE 113 (Michael B. Katz ed., 1993). Federal public housing policies have also fostered racial segregation. From the outset of public housing during the New Deal era, the federal government deferred to local officials on the location of public housing units. Faced with local resistance to building in predominantly white areas, federal officials sited public housing in predominantly black, economically depressed neighborhoods, a pattern that continues to the present. Sloane, *supra* n.41, at 85-87.

more often than white families.[47] Federal regulators acquiesced in this discriminatory conduct throughout the 1970s and 1980s.[48]

Federal "urban renewal" policy devastated black urban areas. "Slum clearance," officially introduced in 1949, diminished available housing for African-Americans[49] and ripped apart black neighborhoods by destroying local businesses.[50] Along with federal public housing policy that concentrated African Americans in racially isolated, economically depressed areas, urban renewal policies destabilized inner cities, setting in motion a downward economic spiral that further limited blacks' access to capital. Perhaps nowhere are the deleterious ripple effects of these policies more apparent than in the devastation of largely black inner-city urban areas, including severe economic underdevelopment, substandard schools, limited housing, rampant unemployment, and a paucity of jobs that pay a livable wage.[51] The deep involvement of the federal government in these policies not only reinforced previous patterns but lent them "a permanence never before seen," one

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[47] Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification, in* 2 AMERICA BECOMING 241 (Neil J. Smelser et al. eds., 2001). *See also* William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735 (1997-98) (on persistence of "redlining" in closely-related property insurance industry) .

[48] Sloane, *supra* n.41, at 85-87.

[49] *See, e.g.*, Orfield, *supra* n.41, at 787 (citing NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 163 (1968)).

[50] *See, e.g.*, John F. Bauman, Norman P. Hummon & Edward K. Muller, *Public Housing, Isolation and the Urban Underclass, Philadelphia's Richard Allen Homes, 1941-1965*, 17 J. OF URB. HIST.281 (1991).

[51] *Id.* at 286. The federal highway program, which facilitated suburban expansion, also contributed to racial isolation in major urban areas. Rabin, *supra* n.39, at 208, 211.

that "virtually constituted a new form of de jure segregation."[52] The passage of otherwise landmark civil rights legislation has failed to ameliorate the widespread and deeply rooted effects of longtime government policies devised to oppress blacks and to subvert black achievement.[53]

E. Federal Government Policy Has Fostered Pervasive Racial Discrimination In The Construction Industry.

The federal government has perpetuated a highly racially stratified construction industry by protecting segregated trade unions and, in effect, barring blacks from obtaining positions as skilled craft laborers and ultimately positioning themselves to advance in the industry. In the early and mid-twentieth century, black migrants from the South were excluded from all but the

[52] ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 254-55 (2d ed. 1998).

[53] For example, despite the passage of the Fair Housing Act in 1968 and an amended version in 1988, enforcement of housing anti-discrimination laws continues to be inadequate. *See* United States Commission on Civil Rights, *The Fair Housing Amendments of 1988: The Enforcement Report* 5 (1988); Gary Orfield, *Segregated Housing and School Resegregation, in* DISMANTLING DESEGREGATION 299 (Orfield et al. eds., 1996); John Yinger, *The Racial Dimension of Urban Housing Markets in the 1980s, in* DIVIDED NEIGHBORHOODS 64 (Gary A. Tobin ed., 1987). Enforcement of employment anti-discrimination laws has also been severely limited by lack of government resources, *see* M. Bendick *et al.*, *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 32 (1994); Reed Abelson, *Anti-Bias Agency is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, at A12, and deficiencies in Title VII's enforcement scheme. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 55-56 (1992); Stephen J. Schwab, *Employment Discrimination, in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 588-89 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 279 (1995); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L. J. 1, 64 (1996); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 479 (1995).

most menial construction jobs in the North despite their extensive experience in carpentry and masonry.[54] When blacks began to make inroads in construction, Congress intervened to protect white union members against wage competition from black workers by enacting the Davis-Bacon Act. In the hearings that preceded passage of the Act, advocates for the legislation made repeated racial statements regarding southern workers brought north to work on federal projects.[55] In 1935, Congress acquiesced in and effectively sanctioned the racially exclusionary practices of labor unions when it rejected efforts to include anti-discrimination provisions in the National Labor Relations Act.[56] During the 1970s, federal officials "choreographed resistance to the desegregation of the construction industry."[57] As a result, racially discriminatory practices in construction are more "impregnably secure" than in perhaps any other institution in the United States.[58]

Such discrimination has impeded the entry of African Americans into the construction industry, either as employees or as self-employed business owners. Blacks are "persistently more under-represented among the ranks of self-employed persons in construction than they have been in traditionally discriminatory skilled crafts."[59] And this remains the case

[54] THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS, 115 (1996).

[55] David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276, 281-87 (1994).

[56] Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 851-52 (2000).

[57] Joshua B. Freeman, *Hardhats: Construction Workers, Manliness and the 1970 Pro-War Demonstrations*, 26 J. OF SOC. HIST. 737 (1993).

[58] *See generally* Hill, *supra* n.32.

[59] Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination*, 19 POL. & SOC'Y 292, 296 (1991). *See also* Helene Slessarev, *The Collapse of the Employment Policy*

despite two decades of affirmative action efforts in government contracting.[60]

These barriers are more than just those experienced by all newcomers to an industry, but rather are distinctly racial in character. In the late nineteenth and early twentieth century, "trade unions frequently were the instrument that forced black workers out of jobs they had traditionally held by replacing them with immigrant white workers after union organization."[61] The unions opposed inclusion of anti-discrimination measures in the National Labor Relations Act.[62] In 1969, white workers held raucous demonstrations to oppose desegregation efforts affecting building trades.[63] Resistance to desegregation continued through the middle and late twentieth century.[64]

For example, black enrollment in apprenticeship programs in Detroit declined between 1957 and 1966, with only 41 blacks enrolled as apprentices out of a total of 2,363, or 1.7% of the total.[65] Detroit's patterns were similar to those existing elsewhere.[66] In New York City, the construction business

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Agenda: 1964-1981, *in* DREAM AND REALITY: THE MODERN BLACK STRUGGLE FOR FREEDOM AND EQUALITY 115 (Jeannine Swift ed., 1991) (finding federal government's expenditure of over $4 million in subsidies between 1967 and 1970 for programs to recruit blacks for union apprenticeship programs failed to open doors for blacks in building trades).

[60] Hill, *supra* n.32, at 296.

[61] *Id.*

[62] Plass, *supra* n.56, at 850-53.

[63] Freeman, *supra* n.57, at 734.

[64] *Id.* at 737; Waldinger & Bailey, *supra* n.59, at 293-94.

[65] Sugrue, *supra* n.54, at 117.

[66] *Id.* at 116. One study found that according to the 1960 census, only 3.3% of all apprentices are black, while in California and New York, "the two largest and . . . most progressive states in the Union," the percentage

experienced a boom in the 1980s such that "the value of construction contracts doubled in real terms between 1976 and 1987, which in turn doubled the size of the local construction labor force."[67] However, this building boom "left black workers out in the cold."[68] During this period, black employment in construction declined almost 15 percent.[69] By the close of the 1980s, black underrepresentation in the industry and its skilled trades was worse than it had been in 1970.[70] Similar patterns existed in other major U.S. cities.[71]

Federal anti-discrimination laws have been ineffective in dealing with the pervasive discrimination in the construction industry. Many unions in the building trades successfully evaded laws barring employment discrimination despite decades of litigation.[72] The informality of the construction industry's personnel practices facilitates racial discrimination by "not only creat[ing] natural barriers to outsider groups," but also by "thwart[ing] public policies designed to counter discrimination."[73] Because the construction industry tends to be

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falls to 1.9 and 2.0 respectively." George Strauss & Sidney Ingerman, *Public Policy and Discrimination in Apprenticeship*, *reprinted in* NEGROES AND JOBS 299 (Louis A. Ferman ed., 1968).

[67] Waldinger & Bailey, *supra* n.59, at 292.

[68] *Id.*

[69] *Id.* at 296.

[70] *Id.*

[71] *Id.* at 294 ("A continuing history of racial conflict over construction jobs is one that New York shares with virtually all major cities.").

[72] Hill, *supra* n.32, at 39. *See also* Sugrue, *supra* n.54, at 116-17. One building-trades union has openly resisted state and federal anti-discrimination laws for nearly a half-century. *EEOC v. Local 638*, 81 F.3d 1162 (2d Cir. 1996); Hill, *supra* n.32, at 39.

[73] Waldinger & Bailey, *supra* n.59, at 293-94.

dominated by small firms that rely on social networks for hiring, enforcement against race discrimination tends to be more difficult and less effective.[74] Deep resistance to desegregation within the construction industry strongly demonstrates that only race-conscious relief can remedy the racial discrimination in the industry.[75]

II. The Effects Of Government-Sanctioned Racial Oppression And Racial Caste Are Evident In The Continuing Economic And Social Disparities Between Blacks And Whites.

Every major economic indicator demonstrates that African Americans continue to experience significant economic disparities compared to whites. In 1999, black median household income stood at only 63% of that of non-Hispanic whites.[76] Blacks earn less than whites in virtually every occupational group.[77] The unemployment rate for blacks is 2.4

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[74] *Id.*

[75] JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, DISCRIMINATION AMERICAN STYLE 51 (1978); WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 281 (1977) ("Despite the multitude of plans and programs, not a great deal has been done to alter the institutional rigidity which limits Black access to construction jobs."); Waldinger & Bailey, *supra* n.39, at 314; Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 28 (1987).

[76] U.S. Census Bureau, *Median Household Income by Race and Hispanic Origin: 1967 to 1999*, <http://www.census.gov/hhes/income/income99/incxrace.html>; *see also* Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1 (Although 42% of whites believe that the average black earns as much as the average white, "[i]n fact, substantial differences persist between black and white earnings. The median household income for whites was $44,366 in 1999, compared with $27,910 for blacks.").

[77] U.S. Bureau of Labor Statistics, Office of Employment and Unemployment Statistics, Current Population Survey, *Usual Weekly*

times that of the white unemployment rate,[78] and blacks are twice as likely as whites to be in poverty.[79] African Americans lag far behind white Americans in overall wealth. For every dollar of wealth the median white household held in 1999, the median black household held 9 cents.[80] Net worth for the median black household declined between 1994 and 1999 while net worth for white households increased 20%.[81] African Americans are 2.3 times more likely to die in infancy than whites, are three times more likely to be below the poverty level than non-Hispanic whites, and have a lower life expectancy than whites.[82]

Black high school students drop out of school at 1.76 times

Earnings of Employed Full-Time Wage and Salary Workers by Occupation, Sex, Race and Hispanic Origin, 2000 Annual Averages, at 13-16, 25-28. While less than 30% of whites earn less than $25,000, almost half of all blacks in 1999 earned less than that. Morin, *supra* n.76, at A7.

[78] U.S. Bureau of Labor Statistics, *Household Data: Annual Averages, Unemployed Persons by Marital Status, Race, Age and Sex*, <ftp://ftp.bls.gov/pub/special.requests/lf/aat24.txt>.

[79] Morin, *supra* n.76, at A7.

[80] Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000) <http://www.isr.umich.edu/src/psid/wealthcomp.pdf>.

[81] Joseph Lupton & Frank Stafford, *Household Net Worth, (Thousands of 1999 Dollars)* Institute for Social Research (Jan. 2000) <http://www.isr.umich.edu/src/psid/wealthcomp.pdf>.

[82] Center on Budget and Policy Priorities, Analysis of Census Bureau's Income and Poverty Report for 1999 (2000) <http://www.cbpp.org/9-26-00pov.htm>; National Center for Health Statistics, *Estimated Life Expectancy at Birth in Years, by Race and Sex, (1999)* <http://www.cdc.gov/nchs/fastats/pdf/47_28t12.pdf>; Marian F. MacDorman & Jonnae O. Atkinson, *Infant Mortality Statistics from the 1997 Period Linked Birth/Infant Death Data Set*, 47 NAT'L VITAL STAT. REP. 2 (1999).

the rate of white students.[83] Black high school graduates are significantly less likely than their white peers to enter college within a year of graduation.[84] Even at the college level, racial differences in completion rates have increased since the early 1990s.[85] Despite increasing racial diversity in the country generally, the racial segregation of public schools has increased in the past decade.[86]

Black/white segregation in housing — the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and, ultimately, wealth[87] — "remains the most extreme" of all residential segregation.[88] "No other ethnic or racial group in the history of the United States has ever, even briefly, experienced such high levels of residential segregation."[89] Moreover, unlike the experience of other ethnic groups, segregation of African Americans is not

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[83] National Center for Education Statistics, Quick Tables & Figures, *Percentage distribution of 16- to 24-year olds who were not enrolled in school and had not completed high school, by race/ethnicity and recency of migration: 1997.* <http://nces.ed.gov/quicktables/>.

[84] *The Schooling of Black Americans, in* A COMMON DESTINY 378-79 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

[85] Rebecca M. Blank, *An Overview of Trends in Social and Economic Well-Being, by Race, in* 1 AMERICA BECOMING 26 (Neil J. Smelser, et al. eds., 2001).

[86] Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* 14, 17 (2001).

[87] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS 235 (1993).

[88] Janny Scott, *Rethinking Segregation Beyond Black and White*, N.Y. TIMES, July 29, 2001, § 4, at 1, 6.

[89] Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas, in* 1 AMERICA BECOMING 399, 401 (Neil J. Smelser et al. eds., 2001).

explained by class — "no matter how socioeconomic status is measured, black segregation remains universally high."[90]

These disparities exist, in whole or in part, as a result of racial discrimination and its continuing effects.[91] Blacks experience persistent disparities in family income, a legacy of past [92] and present pervasive race discrimination in housing [93] and in the labor market.

In the labor market, African Americans continue to face the exclusionary barriers created by segregated social networks, information bias, and statistical discrimination.[94] All factors

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[90] Massey & Denton, *supra* n.87, at 88 (1992).

[91] *See, e.g., Overview: Then and Now, in* A COMMON DESTINY 50 (Gerald D. Jaynes & Robin M. Williams eds., 1989). A number of studies show a direct correlation between discrimination and the degree of racial segregation in different urban areas. Massey, *supra* n.89, at 419.

[92] David W. Bartelt, *Housing the "Underclass," in* THE UNDERCLASS DEBATE (Michael B. Katz ed., 1993).

[93] National studies have found pervasive racial discrimination in the sales and rental markets. Massey, *supra* n.89, at 418-20. A 1988 study concluded that African Americans and Latino Americans have at least a 50% chance of facing discrimination in the rental and sales markets. United States Commission on Civil Rights, *supra* n.53, at 1-2; *see also* Massey & Denton, *supra* n.87, at 99; A COMMON DESTINY, *supra* n.91, at 50 ("There is extensive documentation of the purposeful development and maintenance of involuntary residential exclusion and segregation. Residential segregation has not been an unplanned, spontaneous process, nor has it disappeared along with legal segregation."); Norman Fainstein, *The Underclass/Mismatch Hypothesis as an Explanation for Black Economic Deprivation*, 15 POL. & SOC'Y 403, 439-40 (1986-87) ("Combined with virulent racism in housing markets . . . outright discrimination along with more subtle forms of channeling in labor markets goes a long way toward explaining black economic disadvantage").

[94] Braddock & McPartland, *supra* n.75, at 27 ("Minorities face special difficulties in the employment process not only because they are victims of past discrimination in educational and occupational opportunities, but also

being equal, blacks on average are less likely to receive job offers than whites[95] and can expect to "sample about 50 percent more jobs than whites to get an offer."[96] Black applicants are also "much less likely to be hired by small establishments than large ones and are less likely to be hired for jobs that involve significant contact with white customers."[97] The greater the degree of informality and subjectivity in the hiring process, the greater the likelihood of discrimination.[98] Absent comprehensive federal government protection and regulations, "the prospects of suburban job opportunities for black workers are dismal at best" due to general white "aversion" against blacks.[99]

Distinct racial barriers have also limited the entrepreneurial opportunities of African Americans. While self-employment

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because of the specific barriers that qualified individuals often encounter at present because of their membership in a race or ethnic minority group."); *see also* MICHAEL FIX & RAYMOND J. STRUYK eds., CLEAR AND CONVINCING EVIDENCE (1992); Braddock & McPartland, *supra* n.75, at 5-39; Bendick, *supra* n.53; Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. OF ECON. 835-67 (1998); Harry J. Holzer, *Why Do Small Establishments Hire Fewer Blacks than Large Ones?*, 33 J. OF HUM. RESOURCES 896-914 (1998).

[95] Harry J. Holzer, *Race Differences in Labor Market Outcomes Among Men, in* 2 AMERICA BECOMING (Neil J. Smelser et al. eds., 2001) 106; Fix & Struyk, *supra* n.94.

[96] Fix & Struyk, *supra* n.94, at 193.

[97] Holzer, *supra* n.94, at 106. *See also* Holzer, *supra* n.95, at 896-914; Holzer & Ihlanfeldt, *supra* n.94, at 835-67.

[98] Holzer, *supra* n.94, at 106; Braddock & McPartland, *supra* n.75, at 5-39; Holzer, *Informal Job Search and Black Youth Unemployment*, 77 AM. ECON. REV. 446-452 (1987).

[99] BRUCE WILLIAMS, BLACK WORKERS IN AN INDUSTRIAL SUBURB 193 (1987).

has been the key to economic success and wealth accumulation for many Americans, blacks "have faced levels of hardship in their pursuit of self-employment that have never been experienced as fully by or applied as consistently to other ethnic groups, even other nonwhite ethnics."[100] For many years during the first half of the twentieth century, many types of businesses were off-limits to African-Americans, and those African-American businesses that did exist were restricted to all-black segregated markets. Barriers to entry prevent blacks from competing in an open market. This has ensured "low levels of black business development and has kept black businesses relatively small."[101]

Conclusion

The barriers faced by African Americans, as a class, who seek to establish construction businesses and obtain contracts, are thus very different in nature, origin and intensity from those that may be encountered by Americans of different backgrounds, contrary to Petitioner's suggestion. While non-black persons or families may, on an individual basis, experience disadvantages that limit or impede their economic potential, this country's long-maintained, governmentally-sanctioned discriminatory policies and customs continue to this day to systemically impede access to the economic mainstream for blacks. Such racial disadvantage is not — as this Court has sometimes suggested — the vestigial, attenuated remnant of amorphous "societal discrimination," but has resulted from deeply rooted racial discrimination by federal, state, and local government actors as well as private individuals aided by discriminatory government policies.

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[100] Oliver & Shapiro, *supra* n.40, at 45.

[101] *Id.* at 47.

The powerfully entrenched disparities between blacks and whites that result, accompanied by ongoing racial discrimination, persist in making this country race-conscious, notwithstanding determined efforts by some to deny — in the face of every indication to the contrary — the continuing significance of race:

> The appeal of color-blindness is that it projects as moral what is not; by refusing to see and act on the reality of continued discrimination, the color-blind can project themselves as above the fray, unsullied by manipulations of color. This, of course, leaves the problem unsolved, and, even worse, ensures that the problem will be ignored."[102]

This Court should turn away from such a course and hold that the Fourteenth Amendment authorizes race-conscious remedies that redress the cumulative effects of centuries of government-sanctioned discrimination against blacks and the exclusion of blacks from the economic mainstream; and that the Department of Transportation's Disadvantaged Business Enterprise program, therefore, serves the compelling state interest of remedying this country's incontrovertible history of racial oppression and of fulfilling the unfinished promise of the Fourteenth Amendment.

For the foregoing reasons, the judgment of the court below should be affirmed.

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[102] Anthony Marx, *Racial Trends and Scapegoating: Bringing in a Comparative Focus, in* 1 AMERICA BECOMING 311 (Neil J. Smelser et al. eds., 2001).

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